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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. .....

THE RAYMOND BAG COMPANY,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

STATEMENT AS TO JURISDICTION.

OPINION BELOW.

The opinion of the Supreme Court of Ohio from which this appeal is taken is officially reported in *163 Ohio State, 275.* It is also reported in *126 N. E. (2d), 321.* Copies of such opinion with the pertinent journal entry of the Board

of Tax Appeals of the state of Ohio are appended hereto as Appendix A. The journal entry of the Board of Tax Appeals of Ohio is unreported.

GROUNDS ON WHICH JURISDICTION IS INVOKED.

(i) This suit was brought under *Section 5717.04, Revised Code of Ohio (General Code Section 5611.2)* set forth in Appendix B, on direct appeal to the Supreme Court of Ohio from an order of the Board of Tax Appeals of the state of Ohio affirming the refusal of the appellee (Tax Commissioner) to issue certificates of abatement to appellant with respect to franchise taxes theretofore overpaid by it. Such certificates of abatement were sought by appellant from the Tax Commissioner pursuant to *Section 5703.05, Revised Code of Ohio (General Code Section 1464-3)*. See Appendix B.

(ii) The date of the judgment of the Supreme Court of Ohio sought to be reviewed and the time of its entry is April 27, 1955. Appellant filed its notice of appeal on July 15, 1955 in the Supreme Court of Ohio.

(iii) The jurisdiction of the Supreme Court of the United States to review the aforesaid decision by direct appeal is conferred by *Title 28 U. S. Code, Section 1257 (2)*.

(iv) The following cases are believed to sustain the jurisdiction of this court to review the aforesaid judgment:

New Jersey Realty Title Insurance Co. v. Division of Tax Appeals. 338 U. S., 665;
Missouri Insurance Company v. Gehner, 281 U. S., 313;
Macallen Company v. Massachusetts, 279 U. S., 620;
Northwestern Mutual Life Insurance Co. v. Wisconsin, 275 U. S., 136;
Miller v. Milwaukee, 272 U. S., 713;
Farmers Bank v. Minnesota, 232 U. S., 516;

Home Savings Bank v. Des Moines, 205 U. S., 503;
Bank of Commerce v. New York City, 2 Black, 620;
Weston v. City Council, 2 Peters, 449.
Bank Tax Case, 2 Wallace, 200;

(v) This appeal involves the validity of the construction by the Supreme Court of Ohio of certain statutes of the state of Ohio, being Sections 5733.01; 5733.02; 5733.03; 5733.05; 5733.06; and 5733.12, *Revised Code of Ohio (General Code Sections* 5495; 5496; 5497; 5498; 5499; and 5491). The text of these statutes is set out verbatim in Appendix B, together with the volume and page where they may be found in the official edition.

QUESTIONS PRESENTED.

This appeal involves the power of the state of Ohio under the *U. S. Constitution, Article I, Section 8*, and under *31 U. S. C. A., Section 742*, to impose an excise denominated a franchise tax against domestic corporations doing business in Ohio where the tax is measured by the value of the corporation's issued and outstanding shares of capital stock; and where this share value in turn is required to be determined by the corporate net worth as defined by statute, including in such net worth at a valuation securities issued by the U. S. Government and owned by the corporation paying the tax.

In practical operation and effect the tax is levied against corporate net worth, including therein the value of the corporation's federal securities. The tax has a direct impact upon the state-tax exempt federal securities (R., 23). Specifically the question presented is:

Do the Ohio Franchise Tax Statutes (Section 5733.01, R. C. of Ohio and following; G. C. 5495) as construed by the Supreme Court of the state of Ohio and applied by the

Tax Commissioner of said state impose a state tax on tax-exempt Treasury Notes or other obligations of the United States in violation of the *United States Constitution*, Article I, Section 8, or 31 *U. S. C. A.*, Section 742, by reason of the required inclusion of such obligations of the United States owned by appellant, an Ohio corporation, in its net worth tax base upon which the franchise tax is computed?

STATEMENT OF THE CASE.

Appellant is a corporation organized and existing under the laws of the state of Ohio with its principal office in Middletown, in said state. It manufactures and sells multi-wall paper shipping sacks.

On June 2, 1952, and on October 2, 1952, appellant addressed to appellee (Tax Commissioner) two separate claims for certificates of abatement of franchise taxes for the years 1947 through 1951 (R., 1, 2).* These claims were made under authority of *Section 5703.05, Revised Code (G. C. 1464-3)*.

They set forth that appellant timely filed its annual reports required of domestic corporations for profit for each of the five years in question; and that appellant subsequently duly paid the franchise taxes for each of the five years on the basis of its annual reports. These claims for abatement called attention to an overpayment in franchise tax resulting from including in the computation of the fee charged against appellant under *Section 5733.06, R. C.*, bonds, notes or other obligations of the United States which should have been excluded on the doctrine of the *Wrenn* cases, 156 Ohio State, 583, and 158 Ohio State, 15. The claims set forth the federal securities owned

* All record references are to printed portions of the record.

by the appellant on the five annual report dates, which equaled the total sum of $1,092,000. Appellant claimed that it overpaid its franchise tax in the years in question in the amount of $1,092, being one-tenth of one percent of the total amount of federal securities owned by it during these years. It was this sum of $1,092 for which appellant sought certificates of abatement in franchise tax (R., 2, 3).

The report forms supplied by appellee (Tax Commissioner) (R., 33-47) require a statement of the total number of shares of the corporation issued and outstanding, together with the total amount of corporate surplus and reserves (R., 16, 21, 24, 27). These items are then required by appellee (Tax Commissioner) to be broken down to show the book value of all assets owned or used in Ohio and of all assets owned or used outside of Ohio, if any, together with total book value of all assets less total corporate liabilities. Such items were required to be detailed as to the kind and character of assets and the book value of each, as cash, accounts and notes receivable; prepaid and deferred items; trade marks; investments including miscellaneous stocks and bonds; United States tax notes; and physical property, both real and personal.

In requiring the listing at their value of the United States government securities owned by appellant, appellee did not permit the deduction of the federal securities from the corporate net worth tax base (R., 7, 8) but the full amount of the United States securities owned by appellant were required to be returned and were returned at their full value and bore their full burden of the state franchise tax at the rate of one-tenth of one percent of their value (R., 17).

Appellee (Tax Commissioner) on September 28, 1954 (R., 9-32) conducted a hearing of appellant's claims at

which time appellant pointed out the basis of its protest comprising the provisions of *Article I, Section 8, United States Constitution,* and *Section 742, Title 31, United States Code,* both in its preliminary statements made to the examiner (R., 11) and in the stipulation of facts forming a part of the record. In this stipulation both appellant and appellee agreed:

> "The only question presented arises from appellant's ownership of federal securities listed in each annual report under segregation of assets." (R., 16)

Testimony was adduced at this hearing by appellant's auditors that:

> "Q. * * * If you will strike out from page 3 of Exhibit A the item 'U. S. Bonds and Tax Notes $131,626' * * * if that is stricken out what effect does that have upon the amount of the tax which would be payable by the taxpayer to the state of Ohio.
>
> "A. If that is stricken out, the net worth would be reduced and the tax base would be reduced in an exactly equal amount, and the tax would be reduced by the sum of $1.00 per thousand times that amount." (R., 23)

Appellee refused to grant the certificate of abatement on April 12, 1954. In doing so, appellee wrote to appellant in material part:

> "* * * 3. The Tax Commissioner in determining the franchise tax of an Ohio domestic corporation for profit under the provisions of Section 5495 et seq. General Code (Section 5733.01 et seq. R. C.) shall use a tax base which is 'the value of the issued and outstanding shares of stock * * * shall be deemed to be the total * * * of its capital surplus, * * * undivided profits, and reserves * * *' without deduction therefrom of the value of any federal securities owned by such corporation (Wrenn Paper Co. v.

Glander, Tax Commissioner, 156 O. S. 583 overruled)." (R., 7)

Appellant filed notice of appeal to the Board of Tax Appeals on May 10, 1954 (R., 3) and in its assignment of eleven claimed errors appellant stated its appeal to be based on the erroneous and improper inclusion by the appellee (Tax Commissioner) in the corporation's net worth tax base of federal securities in violation of *Article I, Section 8, of the United States Constitution* and *31 U. S. C. A., Section 742* because the franchise tax was in practical operation and effect a tax upon United States Government bonds and interest thereon, having a direct impact upon such bonds.

The Ohio Board of Tax Appeals on November 8, 1954 (R., 50) affirmed appellee's ruling:

> "for two reasons. First: The judgment of the court in Fifth Third case completely answers and is dispositive of the issues now again presented. Second: The questions made present the constitutionality of the state's franchise tax law, as construed and now administered. This board is without jurisdiction in constitutional matters."

Appellant filed its notice of appeal in the Ohio Board of Tax Appeals and in the Supreme Court of Ohio on November 23, 1954 as of right, pursuant to *Section 5717.04 of the Revised Code of Ohio (General Code Section 5611-2)* stating the appeal involved "a question of interpretation and application of the *United States Constitution Article I, Section 8*, and the United States laws as more specifically hereinafter set forth in the assignments of errors." Then the notice of appeal set forth twelve assignments of error including references to *Section 742, Title 31 U. S. C. A.* The constitutional and other federal law questions were

argued in these proceedings before the Supreme Court of Ohio. In appellant's brief, at page 18, the argument read in material part as follows:

> "In cases in which the Supreme Court of the United States has upheld a state tax against the contention that it was one imposed on federal securities, the tax was measured either by amount of bank deposits (*Provident Institution v. Massachusetts,* 6 Wall., 611; *Society for Savings v. Coite,* 6 Wall., 594), by the amount of dividends paid (*Home Insurance Co. v. New York,* 134 U. S., 594), by the market value of the corporate shares (*Hamilton Co. v. Massachusetts,* 6 Wall., 632), or by net income (*Educational Films v. Ward,* 282 U. S. 379). All of these franchise cases imposed a tax having no direct relation to the *value* of federal securities. No attempt was made in any of these franchise cases to measure the tax by the *asset value* of the corporation such as was done by the state of New Jersey and is done by the state of Ohio. The distinction between those franchise taxing statutes held valid and those held invalid, is a clear one. If the franchise statute is measured on an asset or ad valorem basis and is increased or decreased directly proportionate to the value of federal securities, the tax is invalid. The rule is stated in *New Jersey Realty Title Insurance Co. v. Division of Tax Appeals,* supra, at 673, as follows:
>
> > 'Our inquiry is narrowed to whether in practical operation and effect the tax is in part a tax upon federal bonds. We can only conclude that the tax * * * is imposed on such securities regardless of the accounting label employed in describing it.'
>
> "This is particularly true where, as here, there is a clearly evinced intention to reach the value of the federal securities."

And again at pages 20 and 21, the argument read as follows:

> "The franchise tax statutes were construed by the Supreme Court in the *Wrenn* case, supra, syl. 3, to 'exclude federal securities from the determination of

the franchise tax.' The *Fifth Third Union* decision, supra, overruling the *Wrenn* case, supra, and thereby removing the protection afforded federal securities from a direct imposition of the tax, evinces a clear in tention when followed by the appellee, as in this case, to tax such federal securities. Especially is this true when the appellee, as here, prescribes franchise tax forms and specially requires a listing of the federal securities on the books of the corporation along with all other assets which are similarly valued ad valorem. A statute, once construed and applied to exclude federal securities, later amended or construed to include federal securities in order to increase the revenue for the state, is obviously aimed at the federal securities, and such action becomes within the purview of the prohibitions stated in *Macallen Company v. Massachusetts,* supra; *Miller v. Milwaukee,* supra; *Bank Tax Cases,* supra. As stated in the *Macallen* case, supra, at page 631:

> 'This was a distinct change of policy on the part of the Commonwealth, adopted, as though it had been so declared in precise words, for the very purpose of subjecting these securities pro tanto to the burden of the tax.' "

The Supreme Court of Ohio, in affirming the decision of the Ohio Board of Tax Appeals refusing the certificates of abatement, said in material part at *163 Ohio State, 275, 276:*

> "Appellant contends that the Ohio franchise tax statutes * * * as construed and applied herein by the commission impose a direct tax upon United States securities and interest thereon contrary to *Section 742, Title 31 U. S. C. A.* and *Section 8, Article I, United States Constitution.*
>
> "The judgment of this court in the case of *Fifth Third Union Trust Co. v. Peck,* 161 Ohio State 169, 118 N. E. (2d) 398 is dispositive of the issues here presented.
>
> The decision of the Board of Tax Appeals is affirmed on authority of that case."

SUBSTANTIALITY OF QUESTIONS INVOLVED.

The Ohio franchise tax is measured by the domestic corporation's surplus, reserves and undivided profits, including the value of its federal bonds; for although the language of the statute imposing the tax (Revised Code Section 5733.05) levies it upon the "value of the issued and outstanding shares of stock of every corporation", this value is defined by the same section of the statute as being "the total value as shown by the books of the company of its capital, surplus, whether earned or unearned, undivided profits and reserves, but exclusive of * * *" certain enumerated items of liability. Thus, the tax is in effect an ad valorem property tax for both the base of the tax and the tax itself is increased or diminished by the amount of the corporation's net worth.

The decision of the Ohio Supreme Court in *Fifth Third Union Trust Company* case, 161 Ohio State, 169, holding the tax constitutional conflicts directly not only with the long line of decisions of the United States Supreme Court but also with several earlier decisions of the Supreme Court of Ohio relating to the same franchise tax statute.

The federal cases have been referred to in this jurisdictional statement under the topic of Grounds on Which Jurisdiction is Invoked. The most outstanding of these federal decisions and the one most controlling here is that of *New Jersey Insurance Company v. Division of Tax Appeals,* 338 U. S., 665. For although there a franchise tax was not involved but a tax on net worth, the Supreme Court of the United States said at page 674:

> "While we are not limited by the State's characterization of its tax, cf. *Wisconsin v. J. C. Penney Co.,* 311 U. S. 435, 443 (1940), we likewise do not think the assessment can be sustained as one levied on a corporate franchise."

At that page (674) and the preceding page, the United States Supreme Court completely distinguished cases relied upon by the New Jersey Division of Tax Appeals to sustain the tax as a franchise levy. The language used at the pages indicated, to distinguish franchise tax cases from the New Jersey ad valorem tax, is peculiarly pertinent here as showing the impropriety of the present tax as well as the substantiality of the federal questions its imposition creates.

The protection of the federal taxing power and its fiscal operations from state taxation has always been a function of which the federal judiciary is especially jealous no matter what form the state imposition takes or what label it bears.

And this is especially so where, as in the *Macallen* case, 279 U. S., 620 at 631, there was a distinct change of policy on the part of the taxing authorities "adopted, as though it had been so declared in precise words, for the very purpose of subjecting these securities pro tanto to the burden of the tax." Similarly, in *Miller v. Milwaukee,* 272 U. S., 713 at 715:

> "A tax very well may be upheld as against any casual effect it may have upon the bonds of the United States when passed with a different intent and not aimed at them, but it becomes a more serious attack upon their immunity when they are its obvious aim."

There is no room for doubt in this case that federal securities are the obvious aim of the Ohio franchise tax under the Ohio statutes as construed by the Ohio Supreme Court in the *Fifth Third Union Trust Company* case, 161 O. S., 169, for there the Ohio Supreme Court overruled the earlier decisions of *Wrenn Paper Company v. Glander* in

156 Ohio State, 583 and 158 Ohio State, 15. Employing in so doing significant language, the Ohio court observed at pages 174 and 175:

> "Section 5495, et seq. General Code, imposing a franchise tax on domestic corporations for profit, for the privilege of exercising their franchises in this state, were enacted primarily for the purpose of raising revenue.
>
> "The General Assembly may prescribe the rules for arriving at the value of the franchise for computing the tax to be assessed thereon, but such rules must be reasonably fair and just in their operation. An arbitrary rule or standard which has no relation to the true value is invalid. The exclusion of a major portion of the assets of one corporation, in determining the value of its franchise, because of the character of some of its investments, whereas all the assets of another corporation are included because it has no such investments, would not be fair or just * * *.
>
> "Application of the principle announced in the *Wrenn Paper Company* case will result in absurd situations. In the instant case such application would mean that the capital accounts of each bank would have no taxable value and each would be relieved from paying any franchise tax except the minimum fee of Twenty Five Dollars ($25.00). This was not the legislative intent * * *."

It must be observed in the *Wrenn* cases the Supreme Court of Ohio theretofore had construed state statutes respecting franchise tax in such a manner as to require the exclusion of federal securities from the tax base. The language of the Supreme Court of Ohio in the *Fifth Third Union Trust Company* case quoted above, can, therefore, mean only that in order to avoid discrimination in matters of franchise tax between corporations who own federal securities and those who did not own federal securities, the federal securities must be taxed. This is the ines-

capable result of the conflicting decisions of the Supreme Court of Ohio in the *Wrenn* cases and in the *Fifth Third Union Trust* case.

It necessarily follows, both from the long line of federal decisions and of the several conflicting decisions of the Supreme Court of Ohio, the federal question here presented is a substantial one. Otherwise appellee will continue to tax federal securities on an ad valorem basis under the guise of a franchise tax and justify his conduct on the basis that he is avoiding a discrimination in matters of state taxation between corporations who own federal securities and those who do not.

Appellant respectfully represents that the question presented here is substantial because a decision by the Supreme Court of the United States thereon will conform the thinking of the taxing officials and the judiciary of the state of Ohio with federal law.

JUDGMENT APPEALED FROM.

A correct copy of the order and judgment here appealed from is set forth in Appendix C.

Wherefore, appellant, The Raymond Bag Company, respectfully submits that the Supreme Court of the United States has jurisdiction of this appeal under *28 U. S. Code, Section 1257 (2).*

Respectfully submitted,

WELLMORE B. TURNER,
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Attorneys for The Raymond Bag Company, Appellant.

APPENDIX A.

Opinion of the Supreme Court of Ohio Together With Concurring Opinion of Hart, J.

Stewart, J., Dissents.

Reported in 163 O. S., 275, 126 N. E. 2d, 321.

(Decided April 27, 1955.)

Per Curiam. Appellant contends that the Ohio franchise tax statutes, Section 5495 et seq., General Code (Section 5733.01 et seq., Revised Code), as construed and applied herein by the commissioner, impose a direct tax upon United States securities and interest thereon contrary to Section 742, Title 31, U. S. Code, and Section 8, Article I of the United States Constitution.

The judgment of this court in the case of Fifth Third Union Trust Co. v. Peck, Tax Commr., 161 Ohio St., 169, 118 N. E. (2d), 398, is dispositive of the issues here presented. The decision of the Board of Tax Appeals is affirmed on authority of that case.

Decision affirmed.

Weygandt, C. J., Matthias, Hart, Zimmerman, Bell and Taft, JJ., concur.

Hart, J., concurring. I am the writer of the opinion in the case of Wrenn Paper Co. v. Glander, Tax Commr., 156 Ohio St., 583, 103 N. E. (2d), 756, holding that, in determining the franchise tax on an Ohio corporation for profit, pursuant to the provisions of Section 5495 et seq., General Code, federal securities owned by such corporation could not be included in the tax base because in legal effect such inclusion resulted in an illegal tax on such securities. That case was overruled by this court in the case of Fifth Third Union Trust Co. v. Peck, Tax Commr., 161 Ohio St., 169, 118 N. E. (2d), 398. I dissented in the latter case,

basing my dissent on the interpretation of ambiguous provisions of Sections 5328-1 and 5328-2, General Code, directing the manner in which the Tax Commissioner shall determine the franchise tax base.

Having given this matter further thought and consideration, I have reached the conclusion that the Fifth Third Union Trust Co. case adopts the better rule which has received persuasive judicial sanction. In the first place, the rule adopted in that case avoids an unjust discrimination in the corporate franchise tax as between corporations, whose assets represented by its shares of stock are invested in federal securities, and those corporations, whose assets are not so invested. See Western Union Telegraph Co. v. City of Omaha, 73 Neb., 527, 103 N. W., 84.

Also persuasive to me is the position taken by the federal Supreme Court in the case of Schuylkill Trust Co. v. Pennsylvania, 296 U. S., 113, 80 L. Ed., 91, 56 S. Ct., 31, in which the court held, in effect, that a state tax upon corporate shares as such, as distinguished from a tax upon the assets constituting the value of the shares, is not objectionable as a tax upon securities of the United States or its instrumentalities owned by the corporation.

The tax involved in that case was one levied on the value of the shares of a corporation, which included tax exempt federal securities and was therefore held invalid; but the court at the same time distinguished such a tax from one on the shares as such. See Cleveland Trust Co. v. Lander, 184 U. S., 111, 46 L. Ed., 456, 22 S. Ct., 394; Des Moines National Bank v. Fairweather, Mayor, 263 U. S., 103, 68 L. Ed., 191, 44 S. Ct., 234. Here the tax is on the franchise and not on the property of the corporation, or even upon the value of the shares of the corporation.

Journal Entry of the Board of Tax Appeals.

(Dated November 8, 1954.)

This cause is an appeal from an order of the Tax Commissioner made on April 12, 1954, which denied an application for a franchise tax abatement for sums exacted and paid during tax years 1947 to 1951, inclusive. The sum sought to be recovered is $1,092.66, which is claimed to have been illegally assessed upon federal securities improperly required to be incorporated within its franchise tax base.

The matter now comes on for further and final consideration upon the commissioner's transcript, appellant's notice of appeal, the record of a hearing had before this board on September 28, 1954, exhibits and briefs of counsel.

In its brief, appellant says that the issues made present "two primary and equally important questions under the federal constitution and statutes", (31 U. S. C. A., Section 742). It appears that such question or questions were before the court in The Wrenn Paper Company v. Tax Commissioner, 156 O. S., 583, and Fifth-Third Union Trust Co. v. Peck, 161 O. S., 169.

The Board of Tax Appeals is now asked to reverse our Superior on the last noted case. The Tax Commissioner's order now complained of must be affirmed for two reasons. First: The judgment of the court in Fifth-Third case completely answers and is dispositive of the issues now again presented. Second: The questions made present the constitutionality of the state's franchise tax law, as construed and now administered. This board is without jurisdiction in constitutional matters.

For the reasons assigned, the order complained of must be and is affirmed.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the Department of Taxation this day taken with respect to the above matter.

Earl H. Maurer, Secretary.

APPENDIX B.

Applicable Statutes.

Section 5717.04 (5611-2)

(6 Baldwin's Ohio Revised Code and Service, Page 88, Title 57)

The proceeding to obtain a reversal, vacation, or modification of a decision of the board of tax appeals shall be by appeal to the supreme court. * * *

Section 5703.05 (1464-3)

(6 Baldwin's Ohio Revised Code and Service, Page 8, Title 57)

All other powers, duties, and functions of the department of taxation * * * are vested in and shall be performed by the tax commissioner, which powers, duties, and functions shall include, but shall not be limited to the following:

* * * * * * * * * * *

(B) * * * the commissioner has the authority on written application of any person, firm, or corporation claiming to have overpaid to the treasurer of state at any time within five years prior to the making of such application any tax payable under any law which the department of taxation is required to administer, or on his own motion investigate the facts and make in triplicate a written statement of his findings, and, if he shall find that there has been an overpayment, issue in triplicate a certificate of abate-

ment payable to the taxpayer, his assigns, or legal representative which shows the amount of the overpayment and the kind of tax overpaid * * *.

Section 5733.01 (5495)

(6 Baldwin's Ohio Revised Code and Service, Page 164, Title 57)

The tax provided by sections 5727.39 to 5727.62, inclusive, and 5733.01 to 5733.27, inclusive, of the Revised Code, for domestic corporations shall be the fee charged against each corporation organized for profit under the laws of this state and each corporation not for profit organized pursuant to sections 1729.01 to 1729.28, inclusive, of the Revised Code, except as provided in sections 5733.09 and 5733.10 of the Revised Code, for the privilege of exercising its franchise during the calendar year in which such fee is payable, and the tax provided by sections 5727.39 to 5727.62, inclusive, and 5733.01 to 5733.27, inclusive, of the Revised Code, for foreign corporations shall be the fee charged against each corporation organized for profit and each corporation not for profit organized or operating in the same or similar manner as corporations not for profit organized under sections 1729.01 to 1729.28, inclusive, of the Revised Code, under the laws of any state or country other than Ohio, except as provided in sections 5733.09 and 5733.10 of the Revised Code, for the privilege of doing business in this state, owning or using a part or all of its capital or property in this state, or holding a certificate of compliance with the laws of this state authorizing it to do business in this state during the calendar year in which such fee is payable.

Section 5733.02 (5495-2 (5496)

(6 Baldwin's Ohio Revised Code and Service, Page 165, Title 57)

Annually, between the first day of January and the thirty-first day of March each corporation incorporated under the laws of this state for profit, each corporation not for profit organized under sections 1729.01 to 1729.28, inclusive, of the Revised Code, each foreign corporation for profit, and each corporation not for profit organized or operating in the same or similar manner as corporations not for profit organized under sections 1729.01 to 1729.28, inclusive, of the Revised Code, doing business in this state, owning or using a part or all of its capital or property in this state, or authorized by the secretary of state to transact business in this state shall make a report in writing to the tax commissioner, in such form as the commissioner prescribes. The commissioner shall furnish corporations, on request, copies of the forms prescribed by him for the purpose of making such report. A domestic corporation shall not dissolve, and a foreign corporation shall not withdraw or retire from business in Ohio, after the first day of January in any year without making a franchise tax report to the commissioner and paying or securing the tax for the year in which such dissolution or withdrawal occurs.

The annual corporation report shall be signed by the president, vice-president, secretary, treasurer, general manager, superintendent, or managing agent in this state of such corporation. If a domestic corporation has not completed its organization, its annual report shall be signed by one of its incorporators.

Section 5733.03 (5497)

(6 Baldwin's Ohio Revised Code and Service, Page 166, Title 57)

The annual corporation report shall include statements of the following facts as of the date of the beginning of the current annual accounting period of such corporation:

(A) The name of the corporation;

(B) The name of the state or country under the laws of which it is incorporated;

(C) The location of its principal office, and, in the case of a foreign corporation, the location of its principal place of business in this state and the name and address of the officer or agent of the corporation in charge of the business in this state;

(D) The names of its president, secretary, and treasurer, with the post-office address of each;

(E) The kind of business in which such corporation is engaged;

(F) The date of the beginning of the current annual accounting period of the corporation;

(G) The amount of its capital, surplus, whether earned or unearned, undivided profits, and reserves, as shown by the books of the corporation; a complete schedule shall be filed with the report showing the object and amount of each such reserve; there shall also be filed with said report a schedule of the annual rates of depreciation and depletion;

(H) The location and value of the property owned or used by the corporation as shown on its books, both within and without the state, given separately; the total amount of business done and the amount of business done within the state by said corporation during its preceding annual accounting period, given separately; business done within

this state by domestic corporations shall include all business except extra-state business;

(I) The value of the good will of the corporation, as shown on its books, if carried as an asset.

Section 5733.05 (5498)

(6 Baldwin's Ohio Revised Code and Service, Page 166, Title 57)

After the filing of the annual corporation report, the tax commissioner, if he finds such report to be correct, shall on or before the first Monday in May determine the value of the issued and outstanding shares of stock of every corporation required to file such report. Such determination shall be made as of the date shown by the report to have been the beginning of the then current annual accounting period of such corporation. For the purpose of this section, the value of the issued and outstanding shares of stock of any such corporation shall be deemed to be the total value, as shown by the books of the company, of its capital, surplus, whether earned or unearned, undivided profits, and reserves, but exclusive of:

(A) Proper and reasonable reserves for depreciation and depletion, as determined by the commissioner;

(B) Taxes due and payable during the year for which such report was made;

(C) Good will as set up in the annual report of the corporation when said annual report is accompanied by a certified balance sheet showing good will carried as an asset on the books of the company; such balance sheet shall not be deemed a part of the public records, but shall be a confidential report for use of the commissioner only;

(D) Such further amount as, upon satisfactory proof furnished by the corporation, the commissioner finds to represent the amount by which the value of the assets,

other than good will, of the corporation, as carried on its books, exceeds the fair value thereof; claim for the deduction of such difference must be made by the corporation at the time of filing its report. The commissioner shall then determine the base upon which the fee provided for in section 5733.06 of the Revised Code shall be computed as follows: divide into two equal parts the value as determined in this section of the issued and outstanding shares of stock of each corporation filing such report; take one part and multiply by a fraction whose numerator is the fair value of all the corporation's property owned or used by it in this state, and whose denominator is the fair value of all its property wherever situated, in each case eliminating any item of good will; take the other part and multiply by a fraction whose numerator is the value of the business done by the corporation in this state during the year preceding the date of the commencement of its current annual accounting period, and whose denominator is the total value of its business during said year wherever transacted.

In determining the value of intangible property, including capital investments, owned or used in this state by either a domestic or foreign corporation, the commissioner shall be guided by sections 5709.02 and 5709.03 of the Revised Code, except that investments in the capital stock of subsidiary corporations at least fifty-one per cent of whose common stock is owned by the reporting corporation shall be allocated in and out of the state in accordance with the value of physical property in and out of the state representing such investments.

On the first Monday in June, annually, the commissioner shall certify to the auditor of state the amount determined by him by adding the two figures thus obtained for each corporation.

Section 5733.06 (5499)

(6 Baldwin's Ohio Revised Code and Service, Page 168, Title 57)

On or before the fifteenth day of June, annually, the auditor of state shall charge for collection from each corporation a fee of one tenth of one per cent upon the value certified and shall immediately certify the same to the treasurer of state, provided that no fee shall be charged from any corporation which has been adjudicated a bankrupt, or for which a receiver has been appointed, or which has made a general assignment for the benefit of creditors, except for the portion of the then current year during which the tax commissioner finds such corporation had the power to exercise its corporate franchise unimpaired by such proceedings or act. The minimum fee shall be twenty-five dollars.

Upon receipt of the certificate of the auditor of state, the treasurer of state shall mail to each corporation at its principal office in the state, or to such person in the state as the corporation designates in its report, a statement showing the value or the proportionate value of the shares of stock upon which such fee is charged, and the amount of the fee. Such fee shall be payable to the treasurer of state on or before the fifteenth day of the following July. If such fee is not paid on or before that time a penalty shall attach thereto as provided in section 5733.12 of the Revised Code. No penalty shall attach prior to the expiration of thirty days from the date of the mailing of the statement by the treasurer of state."

Section 5733.12 (5491)

(6 Baldwin's Revised Code and Service, Page 170, Title 57)

All franchise fees or taxes received by the treasurer of state under sections 5733.01 to 5733.27, inclusive, of the Revised Code, shall be credited to the general revenue fund.

If any corporation fails to pay on or before the dates, or within the time fixed by law, the fee charged against it, the treasurer of state shall certify the list of such delinquent corporations to the auditor of state, who shall add to the tax or fee due a penalty of fifteen per cent. The auditor of state shall forthwith prepare proper duplicates and reports of such taxes, fees, and penalties and certify them to the attorney general for collection.

Thirty days after he receives such duplicates of delinquent taxes, fees, and penalties from the auditor of state, the attorney general shall certify to the tax commissioner a list of the corporations that have failed to pay such taxes, fees and penalties.

APPENDIX C.

Journal Entry of the Supreme Court of Ohio.

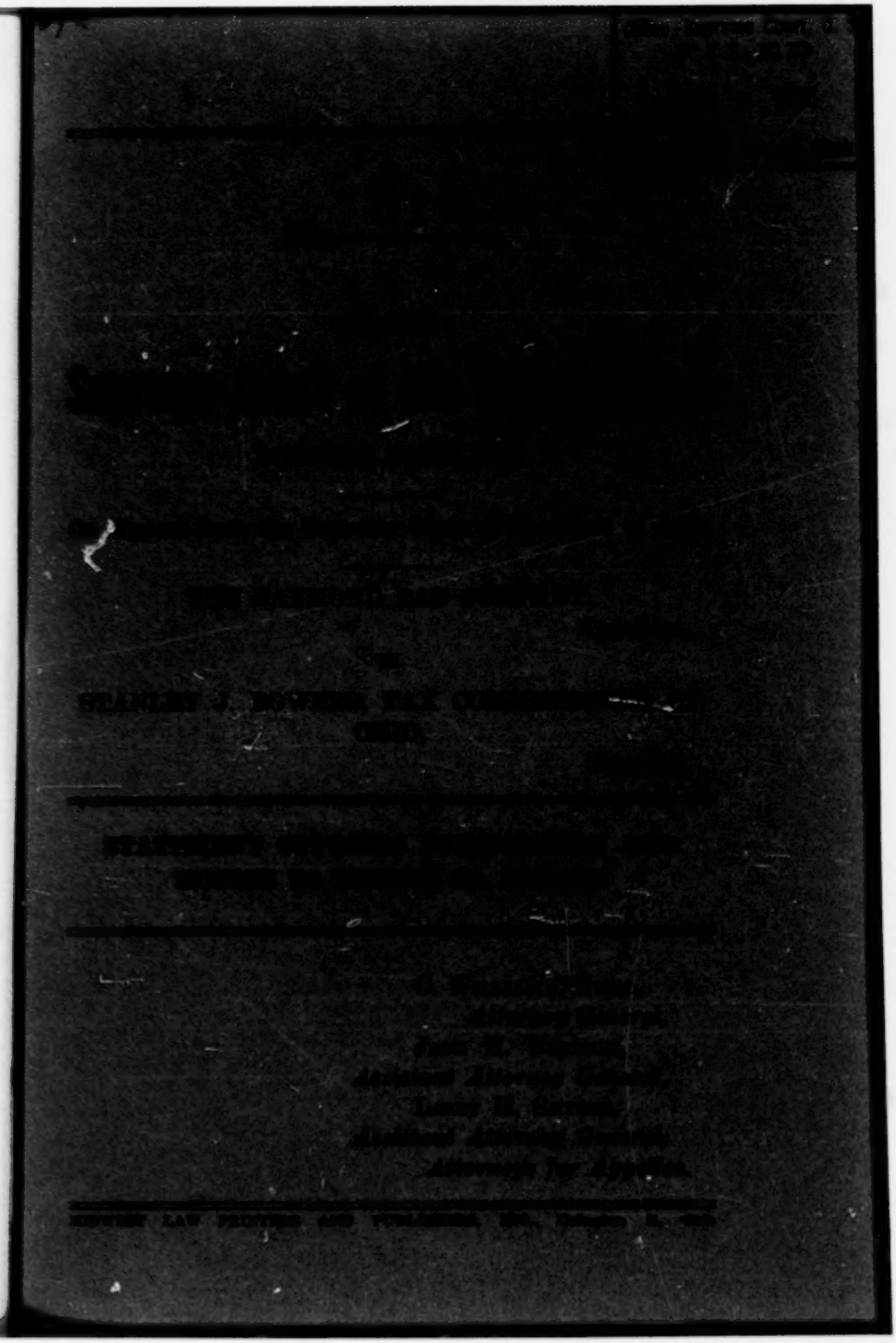
This cause came on to be heard upon the transcript of the record of the Board of Tax Appeals and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the decision of the said Board of Tax Appeals be and the same hereby is affirmed, for the reasons stated in the opinion rendered herein.

Ordered, that a special mandate be sent to the Board of Tax Appeals, to carry this judgment into execution.

I, Seba H. Miller, clerk of the Supreme Court of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the journal of said court.

Witness my hand and the seal of said court this twenty-seventh day of April A. D. 1955.

/s/ Seba H. Miller, Clerk.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. .....

THE RAYMOND BAG COMPANY,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

The appellee in the above entitled cause, for its statement in opposition to appellant's statement as to jurisdiction herein and in support of appellee's motion to dismiss or affirm, respectfully states the following:

I.

Statement of Issue on Appeal.

Appellant is a corporation for profit organized under the laws of Ohio. During the tax years in question it owned United States securities the value of which was returned in the annual report required of domestic corporations for profit. The value of these United States securities was included in the tax base, set up by Section 5733.05, Revised Code of Ohio, in arriving at the Ohio corporations tax due from appellant. The pertinent sections of the Ohio law are as follows:

Section 5733.01, Revised Code:

> "The tax provided by sections 5727.39 to 5727.62, inclusive, and 5733.01 to 5733.27, inclusive, of the Revised Code, for domestic corporations shall be the fee charged against each corporation organized for profit under the laws of this state and each corporation not for profit organized pursuant to sections 1729.01 to 1729.28, inclusive, of the Revised Code, except as provided in sections 5733.09 and 5733.10 of the Revised Code, for the privilege of exercising its franchise during the calendar year in which such fee is payable, and the tax provided by sections 5727.39 to 5727.62, inclusive, and 5733.01 to 5733.27, inclusive, of the Revised Code, for foreign corporations shall be the fee charged against each corporation organized for profit and each corporation not for profit organized or operating in the same or similar manner as corporations not for profit organized under sections 1729.01 to 1729.28, inclusive, of the Revised Code, under the laws of any state or country other than Ohio, except as provided in sections 5733.09 and 5733.10 of the Re-

vised Code, for the privilege of doing business in this state, owning or using a part or all of its capital or property in this state, or holding a certificate of compliance with the laws of this state authorizing it to do business in this state during the calendar year in which such fee is payable."

Section 5733.05, Revised Code:

"After the filing of the annual corporation report, the tax commissioner, if he finds such report to be correct, shall on or before the first Monday in May determine the value of the issued and outstanding shares of stock of every corporation required to file such report. Such determination shall be made as of the date shown by the report to have been the beginning of the then current annual accounting period of such corporation. For the purpose of this section, the value of the issued and outstanding shares of stock of any such corporation shall be deemed to be the total value, as shown by the books of the company, of its capital, surplus, whether earned or unearned, undivided profits, and reserves, but exclusive of:

"• • • • • • • • • •"

Section 5733.06, Revised Code:

"On or before the fifteenth day of June, annually, the auditor of state shall charge for collection from each corporation a fee of one tenth of one per cent upon the value certified and shall immediately certify the same to the treasurer of state, provided that no fee shall be charged from any corporation which has been adjudicated a bankrupt, or for which a receiver has been appointed, or which has made a general assignment for the benefit of creditors, except for the por-

tion of the then current year during which the tax commissioner finds such corporation had the power to exercise its corporate franchise unimpaired by such proceedings or act. The minimum fee shall be twenty-five dollars.

"Upon receipt of the certificate of the auditor of state, the treasurer of state shall mail to each corporation at its principal office in the state, or to such person in the state as the corporation designates in its report, a statement showing the value or the proportionate value of the shares of stock upon which such fee is charged, and the amount of the fee. Such fee shall be payable to the treasurer of state on or before the fifteenth day of the following July. If such fee is not paid on or before that time a penalty shall attach thereto as provided in section 5733.12 of the Revised Code. No penalty shall attach prior to the expiration of thirty days from the date of the mailing of the statement by the treasurer of state."

The appellant initiated this action by filing with the Tax Commissioner of Ohio applications for certificates of abatement for alleged overpayments of franchise taxes for the years 1947 through 1951, claiming such overpayments resulted from an improper inclusion of federal securities in its franchise tax base. The applications were denied.

The Supreme Court of Ohio in its decision in the instant case affirmed the decision of the Ohio Board of Tax Appeals as follows, 163 Ohio St., 275, at page 276:

> *"Per Curiam.* Appellant contends that the Ohio franchise tax statutes, Section 5495 et seq., General Code (Section 5733.01 et seq., Revised Code), as construed and applied herein by the commissioner, impose a direct tax upon United States securities and interest thereon contrary to Section 742, Title 31, U. S. Code,

and Section 8, Article I of the United States Constitution.

"The judgment of this court in the case of *Fifth Third Union Trust Co. v. Peck, Tax Commr.*, 161 Ohio St., 169, 118 N. E. (2d), 398, is dispositive of the issues here presented. The decision of the Board of Tax Appeals is affirmed on authority of that case."

The appellant now seeks to invoke the jurisdiction of this court contending that the Ohio corporations tax as construed by the Supreme Court of Ohio is a levy upon government securities in contravention of Article I, Section 8, of the Constitution of the United States and Section 742, 31 United States Code Annotated.

II.

The Ohio Corporations Tax is a Franchise Tax Exacted for the Privilege Granted Corporations of Doing Business Within the State.

The tax challenged by the appellant herein is defined by the legislature of Ohio in Section 5733.01, Revised Code, as "the fee charged against each corporation organized for profit under the laws of this state * * * for the privilege of exercising its franchise during the calendar year in which such fee is payable * * *." The Supreme Court of Ohio in considering the nature of this same tax has likewise held that it is an excise tax not a property tax and is for the privilege of exercising a corporate franchise. *The Southern Gum Co., et al., v. Laylin*, 66 Ohio St., 578; *North High Realty Co. v. Evatt*, 143 Ohio St., 231; *The Fifth Third Union Trust Co., et al., v. Peck*, 161 Ohio St., 169.

Despite its characterization by both the legislature and the Supreme Court of Ohio as a franchise tax, appellant contends that it is in effect an ad valorem property tax. It

is reasoned that while the tax is measured by the value of the capital stock of a corporation this value is defined as the total value as shown by the books of the company of its capital, surplus, undivided profits and reserves and, therefore, the base of the tax and the tax itself are increased or diminished by the amount of the corporation's net worth. The conclusion reached by this argument is a complete non sequitur. The argument fails to recognize that the net worth of the company is used solely as a yardstick in determining the value of the corporate stock, the tax base, which in turn is the measure of the exercise of corporate privileges.

There can be no question but that the amount of a franchise tax upon a corporation may be graduated or measured by an appraisal of the whole, or any portion, of the corporate property without thereby making it a property tax. Most franchise taxes are so measured.

The cases of *Society for Savings v. Coite*, 73 U. S. (6 Wall.), 594, and *Provident Institution v. Massachusetts*, 73 U. S. (6 Wall.), 611, are a complete answer to appellant's contention. In each of those cases states had licensed so-called "banks of deposit" or savings banks which were authorized to accept deposits and to invest them, but which could transact no commercial banking business. In each case the state had levied a tax of three-fourths of one percent of the deposits of these savings banks, and each bank had invested sizable amounts of its deposits in government securities. It was held in each case that the tax was a lawful tax upon the corporate franchise and was not a forbidden tax upon the securities. It should be noted that in each case the simple act of removing government securities, or investments of whatever nature, from the tax base would have reduced the tax.

Significantly, in both the *Society for Savings* and *Provident Institution* cases the tax could not have been affected in any way by the character of the property in which the bank deposits were invested. Likewise, the Ohio corporations tax is unaffected by the character of the property in which the capital stock is invested.

Any doubt as to the nature of the tax in question is removed by that provision in Section 5733.06, Revised Code, set out heretofore, which reads:

> "* * * provided that no fee shall be charged from any corporation which has been adjudicated a bankrupt, or for which a receiver has been appointed, or which has made a general assignment for the benefit of creditors, except for the portion of the then current year during which the tax commissioner finds such corporation had the power to exercise its corporate franchise unimpaired by such proceedings or act. * * *"

It is clear from the above quoted language that the Ohio corporations tax can have no application independent of the corporation's enjoyment of the privilege of exercising its franchise and, a fortiori, the privilege of exercising the corporate franchise is the legitimate object of the tax.

III.

The Tax Being One on the Corporate Franchise, the Value of Federal Securities Need Not Be Deducted Before Valuing the Tax Base.

As has been shown, the Ohio tax on corporations is an excise as distinguished from a property tax. There is, therefore, no constitutional requirement that the value of federal securities be deducted before valuing the issued and outstanding shares of stock of a corporation, which are used to measure the franchise tax.

This court has repeatedly made the distinction between a tax invalid because laid directly on governmental instrumentalities or income derived therefrom and an excise which is valid because imposed on corporate franchises even though the corporate property or income which is the measure of the tax embraces tax-exempt securities or their income. *Educational Films Corporation of America v. Ward*, 282 U. S., 379, 75 L. Ed., 400. Also, *Home Insurance Co. v. New York*, 119 U. S., 129, 30 L. Ed., 350; *Pacific Company v. Johnson*, 285 U. S., 480, 76 L. Ed., 893; *Tradesmens National Bank v. Oklahoma Tax Commission*, 309 U. S., 560, 84 L. Ed., 947.

The case of *New Jersey Realty Title Insurance Company v. Division of Tax Appeals*, 338 U. S., 665, is in no way pertinent to the question appellant attempts to raise here, for, as pointed out in appellant's brief, that case did not involve a franchise tax or excise. Rather, the New Jersey tax there under consideration was a tax on the intangible personal property of stock insurance companies.

Nor is there in the case of *The Fifth Third Union Trust Co., et al., v. Peck*, 161 Ohio St., 169, and its overruling of

Wrenn Paper Co. v. Glander, 156 Ohio St., 583, a declaration of legislative intention to tax federal securities comparable to that in *Macallen Company v. Massachusetts,* 279 U. S., 620, 73 L. Ed., 874. In the case of the Massachusetts tax the legislature removed an express exemption granted such securities from which this court reasoned that the legislature intended to reach the securities qua such. *The Fifth Third Union Trust Company* decision, however, was merely to the effect that Sections 5709.02, 5709.03 and 5701.06, Revised Code of Ohio, which in defining investments excluded those issued by the United States or any of its instrumentalities, applied only to the Ohio tax on intangible personal property and that the rule of in pari materia was misapplied to the Ohio corporations tax in the *Wrenn* case. The sole import of this decision is that the legislature of Ohio, in the enactment of the Ohio corporations tax, did not intend to specifically exclude federal securities in valuing the tax base by which the franchise tax is measured.

IV.

No Substantial Federal Question Presented by the Appeal.

Clearly the Ohio corporations tax is an excise on the privilege of exercising a corporate franchise. It is equally apparent that the inclusion of the value of federal securities in arriving at the book value of the issued and outstanding stock of a corporation, the measure used to compute the franchise tax, is violative of neither Article I, Section 8, of the Constitution of the United States nor 31 U. S. C. A., Section 742.

It is submitted, therefore, that appellant has failed to raise a debatable constitutional question by this appeal.

MOTION TO DISMISS OR AFFIRM.

For the foregoing reasons and based upon the foregoing authorities, this appellee moves that the court dismiss the appeal of this appellant or affirm the judgment of the Supreme Court of Ohio.

Respectfully submitted,

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JACK H. BERTSCH,
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Office - Supreme Court, U. S.
FILED
SEP 20 1955
HAROLD B. WILLEY, Clerk

No. 316.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

On Appeal from the Supreme Court of the State of Ohio.

THE RAYMOND BAG COMPANY,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM.

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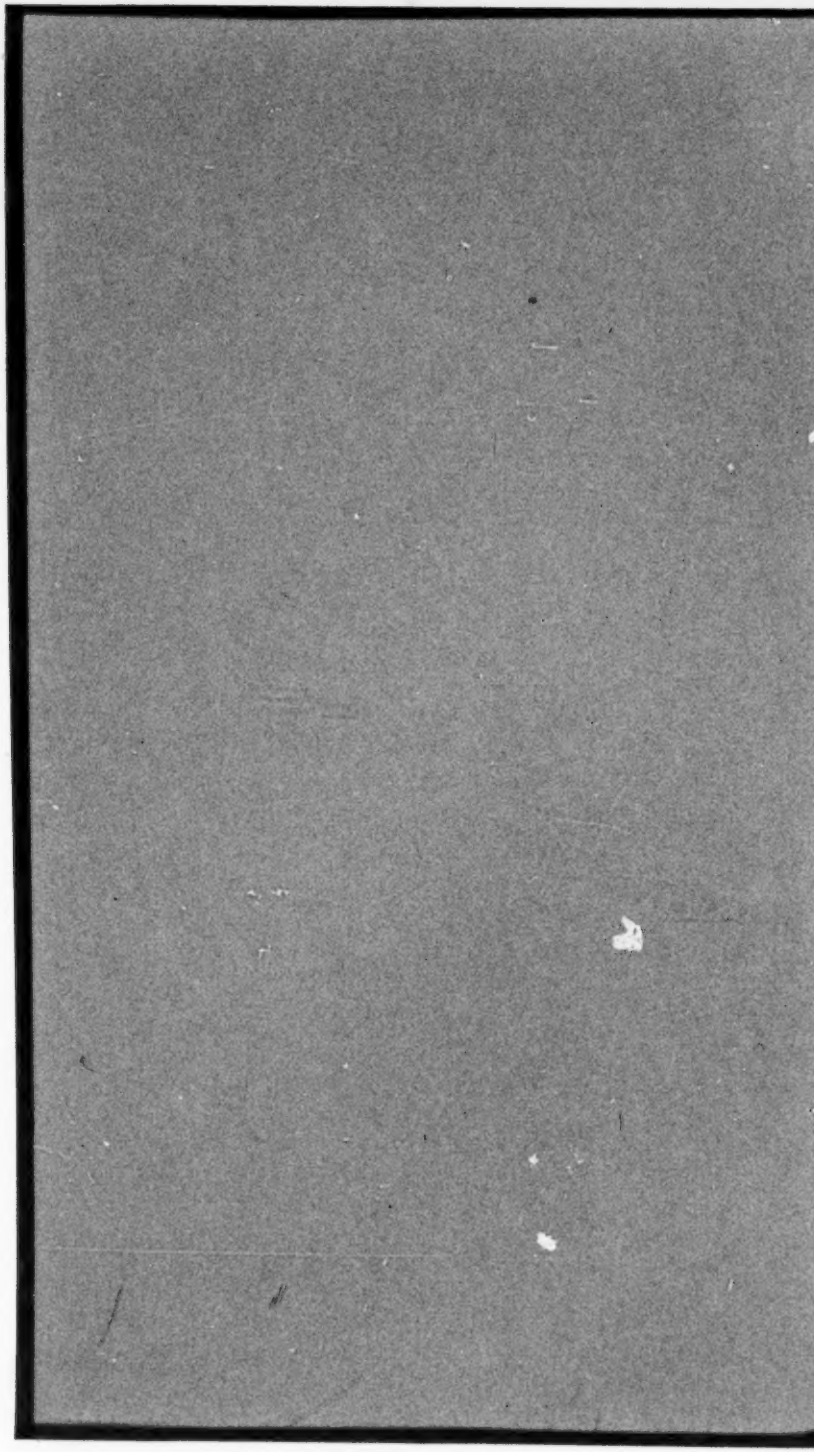

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BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM.

ARGUMENT.

Appellee's motion to dismiss or affirm should be denied for the reason that appellee's whole position is predicated upon the alleged propriety of taxing federal securities provided the tax is guised as being one upon a franchise even though it has a direct impact and incidence upon the securities themselves. A consideration of each of the appellee's points set forth in the statement opposing jurisdiction and motion to dismiss or affirm confirms this.

A. Part II of appellee's statement opposing jurisdiction contends that because Ohio Revised Code Section 5733.01 characterizes the tax as one on corporate franchises, the measurement of that tax upon a base comprising the value of the corporation's net worth, including therein the value of federal securities owned by the corporation, is proper. Appellee cites *Society for Savings v. Coite,* 6 Wall., 594, and *Provident Institution v. Massachusetts,* 6 Wall., 611, in support of the contention.

There are complete and specific refutations of appellee's argument.

1. The authorities cited and relied upon by appellee are clearly distinguishable upon their facts from the case at bar.

a. In the authorities cited by appellee, the franchise tax imposed was measured by bank deposits; it was not measured or affected by the government securities in which the deposits had been invested by the banks. This is not true in the case at bar.

b. No evidence was adduced in those cases and none was possible of a direct incidence of the tax upon the federal securities; what the banks did with their deposits after they were received by the banks, whether invested in federal securities or otherwise, could not result in a direct tax being imposed upon the federal securities. This is not true in the case at bar.

c. No evidence existed in the bank cases establishing that an increase or reduction in the value and amount of federal securities owned had a direct effect upon the amount of the tax paid; the tax being based upon something other than federal securities, it could have no impact upon those securities in the bank tax cases. This is not true in the case at bar.

2. The following facts, in the case at bar, distinguished it from the bank cases cited by appellee:

a. The franchise tax is measured in material part by the value and amount of federal securities owned by taxpayer and required to be listed at value.

b. The uncontradicted and only testimony in the case shows that an increase or decrease in the amount and value of the federal securities in the appellant's net worth results in a direct and immediate increase or decrease in the amount of the tax base and of the tax paid.

c. Unlike the *Coite* case, 6 Wall., 594, 611, the tax here is not computed "wholly irrespective of their (securities) market value or of the disposition of the funds made by the * * *" taxpayer. The determination of the tax is predicated entirely and specifically upon the value of the corporate net worth, including therein all property owned by it, at a value, even federal securities.

d. Appellee fails to distinguish between a franchise tax imposed upon the base of the corporation's nominal capital and a tax imposed upon the corporation's net worth. This distinction was observed as valid by Mr. Justice Clifford in the *Provident* case, 6 Wall., 632, where the court indicated that an imposition upon the nominal capital of the bank, *without regard to value,* was proper. Where, however, the tax base is composed of corporate property at its value, the tax is deemed to have direct incidence upon that property because that is the way property is taxed. This principle has been observed by this Honorable Court in the *New Jersey Insurance Company* case, 338 U. S., 665, at 673, where Mr. Justice Clark said:

> "It matters not whether the tax is, as appellee contends, an indirect or excise levy on net worth measured by corporate capital and surplus, or is, as appellant urges, a tax on personal property based on a valuation gauged by capital and surplus. Our inquiry is

> narrowed to whether in practical operation and effect the tax is in part a tax upon federal bonds. We can only conclude that the tax authorized * * * whether levied against capital and surplus, less liabilities or against entire net worth, is imposed on such securities regardless of the accounting label employed in describing it."

This Honorable Court in *New Jersey Insurance Company v. Division of Tax Appeals,* 338 U. S., 665, at 674, observed the existence of these distinctions (see footnote 6). We, therefore, assert this case is readily distinguishable from the *Coite* case, 6 Wall., 594, and the *Provident* case, 6 Wall., 632, relied on by appellee not only upon the basis of logic hereinbefore indicated, but upon the authority of the *New Jersey Title Insurance* case, 338 U. S., 665, at 674.

3. Appellee at page 7 of his statement opposing jurisdiction and motion to dismiss or affirm, is clearly in error when he asserts to this court that like *Society for Savings,* 6 Wall., 594, and *Provident Institution,* 6 Wall., 632, "the Ohio corporations tax is unaffected by the character of the property in which the capital stock is invested." This is obviously an incorrect conclusion. This is established by the record at bar where the sole witness testified:

> "Q. * * * If you will strike out from page 3 of Exhibit A the item 'U. S. Bonds and Tax Notes $131,626' * * * if that is stricken out what effect does that have upon the amount of the tax which would be payable by the taxpayer to the state of Ohio.
>
> "A. If that is stricken out, the net worth would be reduced and the tax base would be reduced in an exactly equal amount, and the tax would be reduced by the sum of $1.00 per thousand times that amount." (R., 23)

The fact that the tax is characterized as a franchise tax cannot save it from illegality merely by reason of that fact nor even if as appellee contends, it is not imposed if

the corporation does not enjoy its franchise. The important point is that if the corporation does enjoy its franchise, federal securities owned by it bear their full and direct amount of the tax. Thus, when the franchise tax has a direct, operative incidence upon federal securities as here it is invalid. The fact that appellant actually enjoyed its franchise does not validate the tax.

B. Part III of appellee's statement opposing jurisdiction and motion to dismiss or affirm urges that this being a franchise tax the federal securities owned by the taxpayer need not be deducted before valuing the tax base. None of the authorities cited by appellee support his proposition with the exception of *The Fifth Third Union Trust* case, 161 O. S., 169. The cases relied on by appellee at page 8 of his brief are cases not involving a net worth tax, but are franchise taxes predicated upon a tax base of corporate income, corporate dividends, bank deposits and market value of the taxpayer's shares. All of the cases cited by appellee obviously have nothing to do with a valuation or with net worth. Consequently, the character of the property owned by the corporation in the cases cited by appellee is unimportant.

C. Part IV of appellee's statement opposing jurisdiction and motion to dismiss or affirm contends no substantial federal question is presented by the appeal and urges in support thereof that the tax under review "is an excise on the privilege of exercising a corporate franchise." It is appellant's position that regardless of the characterization of the tax as a franchise excise, the true nature and character of the tax as a tax upon federal securities at their value presents a real and substantial federal question.

New Jersey Realty Title Insurance Co. v. Division, 338 U. S., 665, 673.

This court has repeatedly held that it will for itself examine the true character of the tax and in making this examination it will look to the practical operation and effect of the tax with respect to federal securities.

We respectfully submit that the practical effect of the tax in the case at bar is a direct imposition upon federal securities belonging to the taxpayer.

Respectfully submitted,

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FILED
APR 23 19
HAROLD B. WILLEY

No. 316.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

On Appeal from the Supreme Court of the State of Ohio

THE RAYMOND BAG COMPANY,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

PETITION FOR REHEARING OF MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 316

THE RAYMOND BAG COMPANY,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

PETITION FOR REHEARING OF MOTION TO DISMISS OR AFFIRM.

Appellant, The Raymond Bag Company, respectfully petitions this Honorable Court for Rehearing with respect to its order entered herein on April 2, 1956, granting appellee's motion to dismiss or affirm and dismissing this appeal for want of a substantial federal question.

The above order of dismissal followed the decision in the *Werner Machine Company* case, Number 63, October Term, 1955, holding the New Jersey corporate franchise tax proper as being a "bona fide franchise tax" and, therefore, not a prohibited tax upon tax exempt securities issued by the United States government which were included in the New Jersey franchise tax base. Said this Honorable Court in that case:

> "We find no basis in this instance for not accepting the State Court's conclusion that this tax is not imposed directly on the property held by the corporation."

The case at bar is like the *Werner* case in several aspects. The statute involved in each case expressly declares the tax imposed to be a franchise tax. Both statutes provide for the computation of the franchise tax on a basis of the net worth of the corporation. Both state courts treated the tax as a franchise tax in their decisions; the New Jersey Court went further to make a finding to the effect that the New Jersey tax was a bona fide franchise tax. Here the similarity between the two cases ceases.

The case at bar, unlike the *Werner* case, states ample factual grounds in its record upon which this court may declare that the so-called Ohio franchise tax is not in truth and in fact a bona fide franchise tax. As pointed out in the *Werner* decision, the name appended either by statute or judicial decision to a tax is not conclusive upon this court.

In the case at bar, the Ohio court disposed of the issues there presented (163 O. S. 275) upon the basis of its judgment in *Fifth Third Union Trust Company v. Peck,* 161 O. S., 169. There the Ohio court said:

> "The inclusion of federal securities in the tax base set up under Section 5498, General Code, would be consistent with the provisions of Section 742, Title

31, U. S. Code, that federal securities 'shall be exempt from taxation by or under state or municipal or local authority,' for the reason that the tax levied, under Sections 5498 and 5499, General Code, is a franchise tax based on the value of the capital stock and is not a tax on the securities as such."

This finding of the Ohio court that there is here involved a franchise tax based on the value of the capital stock, is predicated upon only a partial consideration of Section 5498 G. C. (R. C. 5733.05). True, Section 5498 G. C. provides that the tax base shall be the "value of the issued and outstanding shares of stock of every corporation required to file such report. * * *" But it continues: "For the purpose of this section, the value of the issued and outstanding shares of stock of any such corporation shall be deemed to be the total value as shown by the books of the company of its capital, surplus, whether earned or unearned, undivided profits and reserves but exclusive of" certain enumerated items. It is impossible to speculate what the state court would have decided as to the necessity for excluding United States government securities from the tax base if it had considered that the franchise tax is based on the "total value as shown by the books of the company of its capital, surplus * * * undivided profits and reserves * * *." The fact remains that it improperly considered only a part of the statute, and thereby imposed a prohibited tax contrary to federal law.

There is a vast and partinent difference between a franchise tax predicated upon corporate shares at a value and a franchise tax predicated upon net worth at book value. The Ohio statute chooses the latter criterion and not the former, and in administering this statute, the record in the case at bar (pages 36 through 47) discloses that the forms supplied and required to be used by the defendant-tax commissioner (R., 17, 24) specifically required the listing of all assets

including "U. S. bonds and tax notes" at book value. The determination, therefore, of the Ohio Court in *Fifth Third Union Trust Company v. Peck*, supra, that the franchise tax was based on the value of the capital stock is a half truth because of the limitation in Section 5498 General Code (R. C. 5733.05) upon the meaning of the phrase "value of the capital stock".

The effect of this difference is testified to in the case at bar by M. A. Roney, tax accountant of the Ernst and Ernst firm who prepared appellant's returns. He said in the course of analyzing the Tax Commissioner's forms, above referred to, (Appellant's Exhibits A through E) that the inclusion of the United States government tax notes in the tax base increases the tax in direct relation to the value of the federal securities themselves. Mr. Roney said in answer to the following question:

> "Q. Now, Mr. Roney, if you will strike out from page 3 of Exhibit A the item, 'U. S. bonds and tax notes, $131,626' * * * what effect does that have upon the amount of the tax which would be payable by the taxpayer to the state of Ohio? A. If that is stricken out, the net worth would be reduced and the tax base would be reduced in an exactly equal amount, and the tax would be reduced by the sum of $1 per thousand, times that amount.
>
> "Q. If the amount of federal securities owned by the company on December 1, 1947, had been double the amount that you have testified to here what would be the effect on the amount of tax paid? A. That would be the change. The tax would be increased by $131.63, or $1 per thousand, times the amount of the increase in the net worth." (R., 23, 24.)

This testimony demonstrates the direct incidence of the Ohio tax on federal securities. No such evidence appeared in the *Werner* case. Furthermore, *The Fifth Third Union Trust Company* decision, supra, is predicated on the propo-

sition that federal securities may be included in the tax base for the declared and avowed purpose of increasing the revenues of the state of Ohio in its general tax fund since the Ohio statute General Code Section 5491 (R. C. 5733.12) provides that the moneys resulting from the so-called franchise tax should go to the general fund of the state. In order to accomplish this, the Ohio court attempted to equalize the so-called franchise tax between those corporations which own federal securities and those corporations which do not own federal securities, the court saying specifically (161 O. S., 174, 175):

> "The exclusion of a major portion of the assets of one corporation, in determining the value of its franchise, because of the character of some of its investments, whereas all the assets of another corporation are included because it has no such investments, would not be fair or just.
>
> "Application of the principle announced in the Wrenn Paper Company case will result in absurd situations. In the instant case such application would mean that the capital accounts of each bank would have no taxable value and each would be relieved from paying any franchise tax except the minimum fee of $25. This was not the legislative intent."

The New Jersey court in its *Werner* decision, made no attempt to use federal securities in the tax base to equalize the franchise tax between those corporations who owned and those who did not own federal securities.

Accordingly, the case at bar can be distinguished from the *Werner* case in the following important aspects:

1. In the *Werner* case, the decision of this Honorable Court is that the franchise tax bears only indirectly and incidentally on the tax-exempt United States securities included in the New Jersey franchise tax base. In the case at bar, the Ohio franchise tax so-called, bears directly upon

the tax-exempt federal securities in the tax base. The purpose, intention and effect of taxing federals is apparent in the record (pages 19 through 31) in the case at bar. This evidence is uncontradicted, is real and substantial, and establishes, without cavil, the fact that the United States government securities under the Ohio franchise tax law directly bears the incidence of the tax. No such evidence exists in the *Werner* case.

2. In the *Werner* decision, no attempt was made by the New Jersey court through a partial and inaccurate reading and application of the tax statute to equalize the New Jersey franchise tax by specifically including federal securities in the tax base for the express purpose of increasing the revenues in the general fund of the state. In the case at bar, however, it is most apparent that the securities of the United States government owned by Ohio corporations are the object of the tax in its practical operation and effect, all for the declared purpose in the language of the Ohio court of avoiding discrimination in state taxation against corporations owning fewer federal securities than others. The reasoning of the Ohio court is to the effect that if a corporation owns federal securities, it must pay a tax upon those federal securities since otherwise it would pay a less tax than other corporations owning fewer or no federal securities. Let us suppose a situation where a corporation's assets were invested 100% in United States government securities and shown on the corporate balance sheet. Under such circumstances there can be no question but that the Ohio tax would be a direct tax and have an immediate and positive incidence upon the federal securities. The fact that the corporation may own less than 100% makes the tax no less direct and immediate in its incidence upon the federal

securities. The language of this Honorable Court in *Miller v. Milwaukee*, 272 U. S., 713 at 715, is pertinent here:

> "It is a familiar principle that conduct which in usual situations the law protects may become unlawful when part of a scheme to reach a prohibited result. If the avowed purpose or self-evident operation of a statute is to follow the bonds of the United States and to make up for its inability to reach them directly by indirectly achieving the same result, the statute must fail even if but for its purpose or special operation it would be perfectly good."

Stated in another way, the same result was reached in *Northwestern Insurance Co. v. Wisconsin*, 275 U. S., 136 at 139-141:

> "Counsel for State maintain that the effect of Section 76-34 is to impose upon domestic insurance companies a privilege or franchise tax, and not one on property or income; that no charge is laid upon bonds of the United States, but the fee exacted is for granted privileges, including exemption from personal property taxation and right to do business * * * and that in no proper sense can the challenged tax be regarded as one directly imposed upon gross income * * *.
>
> "* * * it has been the settled doctrine here that where the principal is absolutely immune, no valid tax can be laid upon income arising therefrom. To tax this would amount practically to laying a burden on the exempted principal. Accordingly, if the challenged Act, whatever called, really imposes a direct charge upon interest derived from United States bonds, it is pro tanto void.
>
> "* * * The distinction between an imposition the amount of which depends upon dividends or net receipts and one measured by gross returns is clear * * *.
>
> "Here the statute undertook to impose a charge of 3 per cent. upon every dollar of interest received by the Company from United States bonds. * * * This amounts, we think, to an imposition upon the bonds themselves and goes beyond the power of the State."

Not only does *The Fifth Third Union Trust Company* decision supra, attempt to justify taxation of federal securities on the ground that to not tax them would discriminate against corporations not owning federal securities but it also results in a discrimination against those domestic corporations which own federal securities for in this way corporations in Ohio are penalized for owning such securities. This legal reasoning of *The Fifth Third Union Trust Company* case, supra, and the factual situation upon which it was predicated are both entirely absent from the New Jersey *Werner* decision.

3. In the *Werner* case, there had been no prior history of conflicting interpretations of the New Jersey statutes regulating franchise taxation. In the case at bar, it must be noted that prior to *The Fifth Third Union Trust Company* decision, supra, the Ohio court in *Wrenn Paper Company v. Glander,* 156 O. S., 583 at 591, held that the Ohio franchise tax statute required General Code Sections 5498, 5328-1 and 5323 (R. C. 5733.05, 5709.02 and 5701.06) to be read together as being in *pari materia,* and that when so read together required United States government securities to be excluded from the franchise tax base because the so-called franchise tax had direct incidence thereon. Upon rehearing the Ohio court affirmed its former decision, 158 O. S., 15. Still later, the *Wrenn* case, supra, was overruled by the Ohio court's decision in *The Fifth Third Union Trust Company* case, supra. The effect of the *Wrenn* decision, supra, was twofold:

(1st) It found the so-called franchise tax to have a direct incidence on federal securities and, therefore, to be in conflict with federal law. Constitution of the United States, Article I, Section 8, Clause 2; 31 U.S.C. Sec. 742.

and

(2nd) It found that the state statutes required the exclusion of federal securities from the tax base thereby eliminating the conflict between the franchise tax and the federal law. In accomplishing this result, the Ohio court in the *Wrenn* decision, supra, read as being in pari materia, Sections 5323, 5328-1 and 5498, General Code (R. C. 5701.06, 5709.02 and 5733.05) all of which sections appeared in Title I, being the "This Title" referred to in General Code Section 5328-1 (R. C. 5709.02).

Subsequently, in *The Fifth Third Union Trust Company* case, supra, the Ohio court abandoned this interpretation of the Ohio statutes by overruling the *Wrenn* decision, supra, and again permitting federal securities included in the tax base to be subject to direct taxation in order, said the court, to equalize the tax among the several corporations of the state who owned varying amounts of federal securities and enabling and requiring corporations who owned federal securities to contribute larger sums to the general tax fund of the state. No such judicial history and consequent legal effect concerning the interpretation of the New Jersey franchise tax appears in the *Werner* decision. It is unique to Ohio. Such judicial history properly may be considered by this Honorable Court in determining whether the franchise tax is bona fide as such or whether it is a mere name cloaking an excise tax.

4. The method of administering the Ohio franchise tax indicates in practical operation and effect it is a tax on net worth. The employment of the word "franchise" in connection with the name of the tax will not change its essential nature. As this court has observed in a net worth tax case:

> "It matters not whether the tax is, as Appellee contends, an indirect or excise levy on net worth measured by corporate capital and surplus or is, as Appellant

urges, a tax on personal property based on a valuation gauged by capital and surplus. Our inquiry is narrowed to whether in practical operation and effect the tax is in part a tax upon federal bonds. We can only conclude that the tax authorized by Section 54:4-22, whether levied against capital and surplus less liabilities or against entire net worth, is imposed on such securities regardless of the accounting label employed in describing it."

New Jersey Realty Title Insurance Company case, 338 U. S., 665 at 673.

5. In the Werner decision, the Pennsylvania court held the tax to be a bona fide franchise, i.e., a tax upon a corporate franchise and not a tax upon net worth. This Honorable Court affirmed, saying there is no basis in this instance for not accepting the state court's conclusion.

But the Ohio decision in the case at bar, predicated as it is and disposed of upon the principles of *The Fifth Third Union Trust Company* case, supra, is, clearly a tax on net worth of appellant. Such a net worth tax, the record in the case at bar discloses, impinges directly upon federal securities. This Honorable Court recognizes the problem presented in such a situation in *New Jersey Realty Title Insurance Company,* 338 U. S., 665 at 673 and 674, a net worth case, where this Honorable Court said:

"It matters not whether the tax is, as Appellee contends, an indirect or excise levy on net worth measured by corporate capital and surplus or is, as Appellant urges, a tax on personal property based on a valuation gauged by capital and surplus. Our inquiry is narrowed to whether in practical operation and effect the tax is in part a tax upon federal bonds.

"The section here in question was not considered as imposing a tax on privilege or franchise by either the New Jersey Legislature or the taxing officials or by any of the Courts below. We are not limited by the state's characterizations of its tax * * * We likewise do not think the assessment can be sustained as one levied on a corporate franchise."

Since the Ohio tax is not a bona fide franchise tax, the principles announced in *New Jersey Title Insurance Company* case, supra, should be applied to the case at bar which presents a record predicated upon a state of facts permitting this Honorable Court to properly determine for itself, unhampered by state court determinations, whether the Ohio tax is as its name indicates, a franchise tax or, as the Ohio court has declared, a means for using a net worth tax to avoid state discrimination against corporations not owning federal securities by directly taxing federal securities in the tax base. The fact that this bears equally upon all assets appearing in the corporate net worth does not lessen the impact of the tax upon the federal securities also appearing in the net worth. It is believed that a substantial federal question is presented on this record which will justify and permit this Honorable Court to rehear the matter without in anywise affecting or disturbing the determination of the *Werner* case.

Wherefore, appellant prays for rehearing of its appeal in this matter and a reconsideration of this Honorable Court's order sustaining the motion of appellee to dismiss or affirm.

Respectfully submitted,

Wellmore B. Turner,
Guy H. Wells,
Hulman Bldg., Dayton 2, Ohio,
Counsel for Appellant.

Certificate of Counsel.

Dayton, Ohio, April, 1956.

The foregoing petition for rehearing is presented in good faith and not for delay.

Guy H. Wells,
Counsel for Appellant.

APPENDIX.

Section 5709.02 (5328-1)

(6 Baldwin's Ohio Revised Code and Service, Title 57)

All money, credits, investments, deposits, and other intangible property of persons residing in this state shall be subject to taxation, except as provided in this section or as otherwise provided or exempted in Title LVII of the Revised Code; but the good will, license, or franchise of a business, whether granted by governmental authority or otherwise, shall not be considered property separate from the other property used in or growing out of such business. Property of the kinds mentioned in section 5709.03 of the Revised Code, used in and arising out of business transacted in this state by or on behalf of a nonresident person, other than a foreign insurance company as defined in section 5725.01 of the Revised Code, and nonwithdrawable shares of stock of financial institutions and dealers in intangibles located in this state shall be subject to taxation; and all such property of persons residing in this state used in and arising out of business transacted outside of this state by or on behalf of such persons, and nonwithdrawable shares of stock of financial institutions located outside of this state, belonging to persons residing in this state, shall not be subject to taxation. Such property subject to taxation shall be entered on the classified list and duplicate of taxable property, or on the intangible property tax list in the office of the auditor of state and the duplicate thereof in the office of the treasurer of state.

A corporation shall not be required to list any of its investments in the stocks of any other corporation or in its own treasury stock.

Section 5701.06 (5323)

(6 Baldwin's Ohio Revised Code and Service, Title 57)

As used in Title LVII of the Revised Code, "investments" includes:

A. Shares of stock in corporations, associations, and joint-stock companies, under whatever laws organized or existing, excepting:

(1) Those which are instrumentalities of the federal government for the taxation of which by the several states no provision is made by act of the congress of the United States;

(2) Those in financial institutions, dealers in intangibles, and domestic insurance companies as defined in section 5725.01 of the Revised Code;

(3) Those defined as deposits by section 5701.05 of the Revised Code.

B. Interest-bearing obligations for the payment of money, such as bonds, certificates of indebtedness, debentures, and notes; certificates of deposit, savings, and other like deposits in financial institutions outside this state yielding income by way of interest or dividends in excess of four per cent of the principal sum withdrawable; and other similar evidences of indebtedness, whether negotiable or not, and whether or not secured by mortgage or lien upon real or personal property or income, by whomsoever issued, excepting those issued:

(1) By the United States or any of its territories, districts, or dependencies;

(2) By any instrumentality of the federal government;

(3) Prior to January 1, 1913, by the state of Ohio or any political or other subdivision or school district in this state;

(4) Pursuant to section 2a of Article VIII, Ohio Constitution;

(5) Which are defined in sections 5701.05 and 5701.07 of the Revised Code as deposits and current accounts.

C. Annuities, royalties, and other contractual obligations for the periodical payment of money and all contractual and other incorporeal rights of a pecuniary nature from which income is or may be derived, however evidenced, excepting:

(1) Interests in land and rents and royalties derived therefrom, other than equitable interests divided into shares evidenced by transferable certificates;

(2) Contracts of employment or partnership, salaries, wages, commissions, seniority and other incorporeal rights derived from any such contract, and retirement annuities or plans that result from contracts of employment;

(3) Contracts of insurance, and dividends paid or applied thereunder; but dividends under contracts commonly known as "combination life and annuity policies" or "cash refund annuities" shall not be excluded from taxation;

(4) Stock purchase, pension, or profit-sharing plans established by an employer for the benefit of his employees or those of his subsidiaries.

D. All equitable interests, life or other limited estates, and annuity interests in any investment described in this section, or in any fund made up in whole or in part of any such investments, wherever located.

No. 316. RAYMOND BAG CO. *v.* BOWERS, TAX COMMISSIONER OF OHIO. Appeal from the Supreme Court of Ohio. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. MR. JUSTICE DOUGLAS would note probable jurisdiction. *Wellmore B. Turner* and *Guy H. Wells* for appellant. *C. William O'Neill,* Attorney General of Ohio, and *Jack H. Bertsch* and *Larry H. Snyder,* Assistant Attorneys General, for appellee. Reported below: 163 Ohio St. 275, 126 N. E. 2d 321.

*As amended by order entered April 9, 1956, *post*, p. 1012.